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No. 88-687

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

LIBERTY LOBBY, INC.,

Petitioner,

—against—

JOHN REES,
SHEILA LOUISE REES,
and THE INFORMATION DIGEST,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

In accordance with Rule 22.5 of the Supreme Court Rules, this reply brief will address itself to arguments raised in Respondents' Brief in Opposition and will be as short as possible.

I.

Respondents have wrenched out of context the decision of the Court in *Liberty Lobby, Inc. v. Dow Jones & Co.*, 838 F.2d 1287, (D.C. Cir.), *cert denied*, _____ U.S. _____ , 109 S.Ct. 75 (1988) and have falsely asserted that the Court had held that "[n]one of its [Liberty Lobby] actions has succeeded." (Respondent's Brief in Opposition, p. 1) The Court in *Dow Jones* had made reference to a discrete number of cases and concluded that "[n]one of these suits has been successful." *Liberty Lobby, Inc. v. Dow Jones & Co.*, 838 F.2d 1287, 1297 (D.C.Cir.), *cert. denied*, _____ U.S._____ , 109 S.Ct. 75 (1988). In fact, the list of cases considered by the Court was limited to just four cases other than the matter now pending before this Court. One of those cases, *Liberty Lobby, Inc. v. Anderson*, 562 F.Supp. 201 (D.D.C. 1983), *aff'd in part, rev'd in part*, 106 S.Ct. 2505 (1986), is still pending before the United States District Court, having been remanded by the United States Court of Appeals for the District of Columbia. In another case, *Liberty Lobby, Inc. v. National Review, Inc.*, No. 79-3445 (D.C. Apr. 20, 1982), the jury rendered a verdict in which Liberty Lobby substantially prevailed. Indeed, in that case National Review appealed from the decision to the Court of Appeals for the District of Columbia after a jury verdict. The entire matter was later resolved between the parties through settlement.

In addition, there are numerous cases involving Liberty Lobby which Liberty Lobby has settled to its satisfaction or prevailed before a jury. Among those are the case brought by treasurer of Liberty Lobby, Willis A. Carto against Fawcett Publications, Inc. for having published a defamatory article in True magazine about Liberty Lobby during 1969, up to and including *E. Howard Hunt, Jr. v. Liberty Lobby, Inc.*, 824 F.2d 916 (11th Cir. 1987), won by Liberty Lobby as a result of a jury verdict rendered during 1985.

Given these circumstances, it is clear that the assertion by the Respondents that Liberty Lobby has never succeeded in a prior action, is, in addition to being irrelevant, and an attempt to prejudice the Court, without merit and made of the whole cloth.

Respondents also assert that Liberty Lobby's Petition for Writ of Certiorari "is replete with inaccuracies and omissions, not the least of which involve the Magistrate's Memorandum Opinion." (Respondents' Brief in Opposition, p. 2) However, Respondents are unable to point to any alleged inaccuracy or omission other than the fact that in keeping with the Rules of the Supreme Court urging Petitioners to be brief and economical, Petitioner published every relevant page of the Magistrate's decision, omitting only a discussion of issues which have no bearing upon the Petition. However, Respondents imply that the Magistrate, in his opinion

on this question, which they refer to as a "remark," commented upon the matter which is now before this Court on only one occasion in his opinion. (Respondents' Brief in Opposition, p. 6) Indeed, as Appendix C, submitted by the Petitioner demonstrates, the Magistrate did not remark upon the presence of actual malice on one occasion, but expounded upon that question on two occasions, (Petitioner's Appendix, pp. A-26 and A-28).

II.

Having responded to the inaccuracies in Respondents' Brief in Opposition, regarding non-central questions for the purpose of correcting the record, Petitioner now addresses the central question pending before this Court.

A United States Magistrate who reviewed the entire case and before whom all the crucial depositions were taken, concluded that the Plaintiff had established through the presentation of clear and convincing evidence actual malice by the Defendants. Although Petitioner in its Petition for Writ of Certiorari took great pains to point out that it did not contend that the U.S. Magistrate had been designated to hear and determine a motion for summary judgment, (Petition, pp. 12-13) the Respondents in their Brief in Opposition continue to assert, as they had in their Motion for Summary Affirmance and in their appeal to the United States Court of Appeals, that the Magistrate was not authorized to hear and determine a summary judgment motion. (Respondents' Brief in Opposition, p. 7)

Petitioner amply demonstrated in its Petition for Writ of Certiorari that Honorable Arthur L. Burnett, Sr., United States Magistrate, not only presided over every relevant deposition, but was called upon to review all of the relevant arguments and documents in the case over a period of more than a half of a year, and was intimately familiar with all of the evidence offered by the Defendants/Respondents and all of the evidence upon which the Defendants/Respondents relied. To this assertion Respondents simply reply that "the Magistrate did not review all of the evidence." (Respondents' Brief in Opposition, p.7) However, to support that conclusion, Respondents are unable to cite a single document or argument which the Magistrate had not reviewed before publishing his Memorandum Opinion. Petitioner observes that the reason that Respondents are willing to rest with their general assertion that the Magistrate did not review all of the evidence, is that they are unable to point to a single word of testimony, exhibit, or argument offered by Respondents/Defendants which had not previously been studied by the Magistrate in this case. —

III.

The Respondents offer a novel theory in their Brief in Opposition as to the standard utilized by the Magistrate in his Memorandum Opinion. They suggest that he did not apply the clear and convincing evidence standard mandated by this Court in *Anderson*. (Respondents' Brief in Opposition, pp. 7-8) Throughout the proceedings Magistrate Burnett, who has since been appointed by the President of the United States to the Superior Court for the District of Columbia, demonstrated a profound knowledge of the law of defamation and the ruling of this Court in *Anderson*. To suggest, in the light of that record, that the statements of the Magistrate were based upon an unconstitutional standard, is absurd. In fact, in his well thought out Memorandum Opinion, the Magistrate cited *Liberty Lobby, Inc. v. Anderson*, (Appendix, A-27). In the same opinion in which he cited *Anderson* the Magistrate concluded:

> Further, the Magistrate is of the view that the plaintiff has sufficient other evidence suggesting fabrication, or at least reckless disregard of the truth based both on alternative sources and plaintiff's counsel's eliciting responses from both John Rees and Sheila Louise Rees, which as a matter of circumstantial evidence, will support arguments of malice, i.e. knowing falsity or reckless disregard of the truth. Counsel for the plaintiff has astutely, during the depositions of the defendants, probed their editorial processes and their state of mind with reference to research, writing and publishing of the two articles at issue in this case, as he was entitled to do under *Herbert v. Lando*, 441 U.S. 153 (1979).
>
> (Appendix, A-26, Memorandum Opinion, June 10, 1986, p. 8)

In addition, the Magistrate, in returning to the subject matter in his Memorandum Opinion held:

> Based on the Magistrate's exposure to this case and hearing the depositions of both John Rees and Sheila Louise Rees, the two principals involved in the publication of the *Information Digest* and the two (2) articles involved in the case, one of March 30, 1984 and the other of March 8, 1985, it appears that the plaintiff already has substantial

> evidence to establish knowing falsity or reckless disregard of the truth, and pursuing these alternative sources would lead at this point in time only to cumulative evidence. Of course, the Magistrate does not intend to prejudge the merits of this case, but at argument on June 4, 1986 counsel for the plaintiff did acknowledge that he felt he had a *prima facie* case against the defendants. If the Magistrate is wrong in this assessment of the case, counsel can ask for a brief extension of the discovery completion date of June 6, 1986 by filing a motion to be acted upon by the Court (Revercomb, J) setting forth good cause for a brief extension of discovery and the names of those alternative source individuals they now wish to depose and a statement of the importance of their depositions at this stage of the case. In the absence of such a motion, discovery shall be deemed closed as of June 6, 1986 as to the liability issues in this case, and counsel shall proceed with the filing of dispositive motions, if any, and if such motions are denied, then they shall proceed with preparing this case for trial within the time frame previously established by the Court.
>
> (Appendix, A-28, Memorandum Opinion, June 10, 1986, p. 11)

The record reveals that the United States Magistrate was familiar with all of the issues raised in the case, all of the evidence offered by the Defendants, that he had presided over every deposition of substance in the case, and that the only new evidence submitted to the District Court which the Magistrate did not have access to, were documents submitted by the Plaintiff/Petitioner which, of course, strengthened Plaintiff's Opposition to Summary Judgment. The record reveals as well that the Magistrate was not only familiar with the decision of this Court in *Anderson*, but that he cited it and relied upon it in his Memorandum Opinion. After exposure to all of the evidence and all of the arguments, the Magistrate, who conducted the depositions and had ample opportunity over a period of days to listen to the testimony of both Defendants (an opportunity which was not available to the United States District Court or the United States Court of Appeals) decided that the Plaintiff had established actual malice to his satisfaction and that any effort to permit the plaintiff to adduce further evidence of actual malice by pursuing alternative sources "would lead at this point in time only to cumulative evidence." (Petitioner's Appendix, A-28) Clearly, the Magistrate was familiar with the law and understood the standard set

forth by this Court in *Anderson* regarding the need to offer clear and convincing evidence. The suggestion to the contrary is unfair and is based upon nothing more substantial than the hopes of the Respondents.

If an impartial jurist, who was intimately familiar with the entire factual basis of the case, and all of the legal arguments offered by the parties, concluded that actual malice had been demonstrated to his satisfaction, how is it possible for a court to conclude that a reasonable juror could not have reached to same conclusion? The gift of prophecy was not required of the District Court in this one particular case.

CONCLUSION

Petitioner respectfully suggests that for the foregoing reasons the Petition for Writ of Certiorari should be granted.

February 10, 1989

Respectfully submitted,

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